

**IN THE SUPREME COURT
FOR THE STATE OF MICHIGAN**

MELISSA MAYS,
MICHAEL ADAM MAYS, JACQUELINE
PEMBERTON,
KEITH JOHN PEMBERTON,
ELNORA CARTHAN, and
RHONDA KELSO,

Plaintiffs-Appellees,

v.

GOVERNOR RICK SNYDER,
STATE OF MICHIGAN,
MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY, and
MICHIGAN DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants-Appellants,

-and-

DARNELL EARLEY and
JERRY AMBROSE,

Defendants, Cross-Appellants,
and Cross-Appellees,

Supreme Court No. 157335

Related Case No. 157340

Court of Appeals No. 335555

Consolidated Cases: 335725, 335726

HON. KATHLEEN JANSEN, P.J.

HON. KAREN M. FORT HOOD

HON. MICHAEL J. RIORDAN

Court of Claims No. 16-000017-MM

HON. MARK T. BOONSTRA

**FORMER EMERGENCY MANAGERS EARLEY AND AMROSE'S ANSWER TO THE
APPLICATION FOR LEAVE TO APPEAL BY GOVERNOR SNYDER, STATE OF
MICHIGAN, MDEQ, AND MDHHS**

Counsel for Plaintiffs

Paul F. Novak P39524

Gregory Stamatopoulos P74199

Weitz & Luxenberg, P.C.

719 Griswold St., Suite 620

Detroit, MI 48226

pnovak@weitzlux.com

gstamatopoulos@weitzlux.com

Counsel for the Former Emergency

*Managers Darnell Earley and Gerald
Ambrose*

William Kim (P76411)

Assistant City Attorney

CITY OF FLINT LEGAL DEPT.

1101 S. Saginaw Street, 3rd Floor

Flint, MI 48502

810.766.7146

wkim@cityofflint.com

Michael L. Pitt P24429
 Cary S. McGehee P42318
 Beth M. Rivers P33614
 Peggy Pitt P31407
 Pitt McGehee Palmer & Rivers, PC
 117 W. Fourth Street, Suite 200
 Royal Oak, MI 48067
 248-398-9800

William Goodman P14173
 Julie H. Hurwitz P34720
 Kathryn Bruner James P71374
 Goodman & Hurwitz, PC

Trachelle C. Young P63330
 Trachelle C. Young & Associates PLLC
 Deborah A. La Belle P31595
 Law Offices of Deborah A. La Belle

Brian McKeen P34123
 McKeen & Associates, PC

Counsel for State of Michigan Defendants
 Aaron D. Lindstrom (P72916)
 Solicitor General
 Counsel of Record

B. Eric Restuccia (P49550)
 Chief Legal Counsel

Richard S. Kuhl (P42042)
 Margaret A. Bettenhausen (P75046)
 Nathan A. Gambill (P75506)
 Zachary C. Larsen (P72189)
 Assistant Attorneys General
 Attorneys for Defendants
 Gov. Rick Snyder, State of Michigan,
 MDEQ, and MDHHS
 Environment, Natural Resources, and
 Agriculture Division
 P.O. Box 30755
 Lansing, MI 48909
 (517) 373-7540
 kuhl@michigan.gov
 bettenhausenm@michigan.gov
 gambilln@michigan.gov
 larsenz@michigan.gov

Eugene Driker (P12959)
 Morley Witus (P30895)
 Todd R. Mendel (P55447)
 Special Assistant Attorneys General
 for Governor Richard D. Snyder
 Barris, Sott, Denn & Driker, PLLC
 333 W. Fort Street, Suite 1200
 Detroit, MI 48226
 (313) 965-9725
 edriker@bsdd.com
 mwitus@bsdd.com
 tmendel@bsdd.com

Dated: April 5, 2018

TABLE OF CONTENTS

Table of Contents	iii
Table of Authorities	iv
Opinions Below	v
Jurisdictional Statement	v
Counter-Statement of Question Presented	v
I. Introduction.....	1
II. Statement of Facts and Proceedings.....	1
A. Emergency Management in Flint	1
B. The Lawsuit.....	3
III. Analysis	4
A. Standard of Review	4
B. Courts must examine the Court of Claims Act, MCL §600.6401 <i>et seq</i> , to determine the Legislature’s intent regarding the jurisdiction of the Court of Claims under that Act	4
C. A logical analysis of the totality of PA 436 supports the conclusion that emergency managers are state officers.....	7
IV. Conclusion and relief requested	11

TABLE OF AUTHORITIES

Cases

<i>Gardner v Dep't of Treasury</i> , 498 Mich 1 (2015)	4
<i>Johnson v Pastoriza</i> , 491 Mich 417 (2012).....	1
<i>Michigan Association of Home Builders v Director of the Department of Labor & Economic Growth</i> , 481 Mich 496, 750 NW2d 593 (2008).....	6
<i>Rowland v Washtenaw Co Rd Comm'n</i> , 477 Mich 197; 731 NW2d 41 (2007)	4
<i>Schobert v Inter-Co Drainage Board of Tuscola, Sanilac & Lapeer Counties for White Creek No 2 Inter-Co Drain</i> , 342 Mich 270; 69 NW2d 814 (1955).....	4

Statutes

MCL §141.1543	1, 8
MCL §141.1549	1, 2, 7
MCL §141.1560	8, 9, 10
MCL §141.1572	9
MCL §15.303	10, 11
MCL §151.1549	11
MCL §600.6419	5, 6

OPINIONS BELOW

The decision of the Court of Appeals reversing the Court of Claims is reported at *Mays v Governor*, —Mich App—; —NW2d—; 2018 WL 559726 (Jan. 25, 2018), amended by unpublished order of the Court of Appeals, entered January 26, 2018 (Docket Nos. 335555, 335725, and 335726).

The decision of the Court of Claims is not reported. *Mays v Governor*, unpublished opinion of the Court of Claims, issued October 26, 2016 (Case No. 16-000017-MM).

JURISDICTIONAL STATEMENT

The Court has discretionary jurisdiction to review by appeal a case after decision by the Court of Appeals. Const 1963, art 6, § 6; MCR 7.303(B)(1).

COUNTER-STATEMENT OF QUESTION PRESENTED

- 1) Do emergency managers fall within the scope of the term “state officers,” as defined by the Court of Claims Act, MCL §600.6401 *et seq.*, and subject to Court of Claims jurisdiction?

Appellants Governor Snyder, State of Michigan, MDEQ, and MDDHS: No.

Cross-Appellants former Emergency Managers Earley and Ambrose: Yes

Plaintiff-Appellee’s answer: Yes.

Trial Court’s answer: Yes.

Appellate Court’s answer: Yes.

STATUTES INVOLVED

600.6419 Court of claims; exclusive jurisdiction; exceptions; claims less than \$1,000.00; powers and jurisdiction; counterclaims; res judicata; setoff, recoupment, or cross declaration; writs of execution or garnishment; judgment as final; no jurisdiction of claim for compensation under MCL 418.101 to 418.941 and MCL 419.101 to 419.104; jurisdiction of circuit court over certain actions and proceedings; "the state or any of its departments or officers" defined.

Sec. 6419.

(1) Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive. All actions initiated in the court of claims shall be filed in the court of appeals. . . Except as otherwise provided in this section, the court has the following power and jurisdiction:

(a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

(b) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ that may be pleaded by way of counterclaim on the part of the state or any of its departments or officers against any claimant who may bring an action in the court of claims. Any claim of the state or any of its departments or officers may be pleaded by way of counterclaim in any action brought against the state or any of its departments or officers.

...

(7) As used in this section, "the state or any of its departments or officers" means this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties.

I. INTRODUCTION

Former emergency managers Darnell Earley and Gerald Ambrose (the “EMs”) agree with and support Arguments I, II and IV advanced in the Application filed by Governor Snyder, the State of Michigan, the Department of Environmental Quality (“MDEQ”) and the Department of Health and Human Services (“MDHHS”) (collectively, the “State Defendants”). Indeed, the EMs timely filed their own application for leave to appeal the decision of the Court of Appeals, making similar arguments. The EMs disagree, however, with Argument III, as advanced by the State Defendants in their Application. Instead, the EMs agree with Court of Appeals that they are “State officials,” and that claims filed against them in their official capacity are subject to the exclusive jurisdiction of the Court of Claims. In the interest of judicial economy, the EMs limit their Answer to the State Defendants’ Application to a discussion of this issue.

II. STATEMENT OF FACTS AND PROCEEDINGS

This civil action arises out of the Flint water crisis. As required at this stage of the proceedings, Plaintiffs’ well-pleaded factual allegations are accepted as true, and reasonable inferences are drawn in their favor. See, e.g., *Johnson v Pastoriza*, 491 Mich 417, 434-35 (2012).

A. EMERGENCY MANAGEMENT IN FLINT

Under the Financial Stability and Choice Act of 2012 (“PA 436”), the Governor can appoint emergency managers to govern local governments in a state of financial emergency. MCL §141.1549(2). The Legislature has determined that insolvent local governments pose a threat to the health, safety, and welfare of all Michiganders and jeopardize the State’s credit rating. MCL §141.1543(a)–(c).

In April 2013, the City of Flint was under emergency management. As part of a cost-saving plan, the Emergency Manager at the time, Ed Kurtz, wanted to switch the City’s water supply from the Detroit Water and Sewerage Department (“DWSD”) to the Karegnondi Water Authority

(“KWA”), a newly-formed regional water authority in Genesee County, to supply the City with water beginning in mid-2016. (Am. Compl. ¶ 49.)

The Governor authorized Kurtz to enter into a contract with KWA. (*Ibid.*) State officials allegedly knew that the Flint River would be used as an interim water source, and that previous studies had cautioned against its use, when the contract between the City and KWA was executed. (*Id* at ¶¶ 50–54.)

In September 2013, the Governor appointed Earley to replace Kurtz as the City’s Emergency Manager. (*Id* at ¶ 56.)

In April 2014, at Earley and MDEQ’s direction, Flint implemented the interim switch to the Flint River, even though the water-quality supervisor at the Flint water plant had allegedly told MDEQ nine days earlier that the plant was not ready to begin operations. (*Id* at ¶ 57.) Within a month, State officials began receiving complaints regarding the water within a month; by June 2014, Flint residents complained that the water was making them ill. (*Id* at ¶ 62.) In October 2014, General Motors stopped using Flint water at its Flint plant, and Flint officials learned about the threat of Legionnaires disease. (*Id* at ¶¶ 66–67.)

In January 2015, Earley resigned. (Am. Compl. ¶ 70.) The Governor appointed Ambrose to replace him. (*Ibid.*)

In February 2015, the U.S. Environmental Protection Agency advised MDEQ that the Flint water supply was contaminated with iron and, potentially, lead. (*Id* at ¶¶ 80–81.) That same month, Flint water users staged public demonstrations protesting against the use of Flint River water. (*Id* at ¶ 79.) In March 2015, the Flint City Council voted to stop using Flint River water, although this vote had no effect because PA 436 stripped the Council of its legislative powers. (*Id* at ¶ 86; *see also* MCL §141.1549(2).) In April 2015, Ambrose resigned as Emergency Manager.

Throughout the rest of 2015, the Governor, certain named officials with MDEQ and MDHHS, and some other unnamed officials allegedly covered up the health emergency, discredited reports, and told the public that the water was safe. (*Id* at ¶¶ 82–83, 89, 93, 96, 98–100, 105–106.) On October 8, 2015, the Governor changed course and ordered Flint to reconnect its supply from DWSD. (*Id* at ¶ 109.)

B. THE LAWSUIT

Plaintiffs filed this action on January 21, 2016. They did not file a notice of claim with the Clerk of the Court of Claims. In lieu of answering the Complaint, the State Defendants and the EMs moved for summary disposition.

In response, Plaintiffs filed an Amended Complaint alleging four claims arising under the State Constitution. Count 1 alleges a violation of substantive due process by reason of a State-created danger. Count 2 alleges a violation of substantive due process by reason of a violation of bodily integrity. Count 3 alleges the denial of fair and just treatment in an investigation. Count 4 alleges an unconstitutional taking of property. (Am. Compl. at 26–31.)

In lieu of answering the Amended Complaint, the State Defendants and the EMs again moved for summary disposition. On October 26, 2016, the Court of Claims entered an order (the “SDO”): (a) granting summary disposition on Counts 1 and 3 under MCR 2.116(C)(8); (b) denying summary disposition on Counts 2 and 4 under MCR 2.116(C)(8); and (c) denying summary disposition under MCR §2.116(C)(7).

All parties appealed to the Court of Appeals, together challenging every ruling in the SDO, except the dismissal of Count 3.¹ On January 25, 2018, the Court of Appeals affirmed the Court

¹ The City of Flint moved to intervene and consolidate the appeal with another pending appeal in *Boler v Governor*, No. 337383, another case arising out of the Flint water crisis, which raised an issue in common with this case. The Court of Appeals denied intervention and

of Claims in a published decision. It is from this decision that the parties have filed cross applications for leave to appeal to this Court.

III. ANALYSIS

A. STANDARD OF REVIEW

A trial court's denial of summary disposition is reviewed *de novo*. *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 202; 731 NW2d 41 (2007). Questions of statutory interpretation are also reviewed *de novo*. *Id.*, 477 Mich at 202. The primary goal in statutory interpretation is to give effect to the intent of the Legislature. *Id.* When the language is unambiguous, words are given their plain meaning and the statute is applied as written. *Id.* Statutory interpretation must give effect "to every phrase, clause, and word in the statute, and no word should be treated as surplusage or rendered nugatory." *Gardner v Dep't of Treasury*, 498 Mich 1, 6 (2015).

B. COURTS MUST EXAMINE THE COURT OF CLAIMS ACT, MCL §600.6401 ET SEQ, TO DETERMINE THE LEGISLATURE'S INTENT REGARDING THE JURISDICTION OF THE COURT OF CLAIMS UNDER THAT ACT

The State Defendants argue that PA 436, rather than the Court of Claims Act, governs whether Emergency Managers are subject to the exclusive jurisdiction of the Court of Claims. For support, they rely upon *Schobert v Inter-Co Drainage Board of Tuscola, Sanilac & Lapeer Counties for White Creek No 2 Inter-Co Drain*, 342 Mich 270, 282; 69 NW2d 814 (1955). The State Defendants misread *Schobert*.

Schobert states that "the term 'State officer' will be governed by the purpose of the act or clause in connection with which it is employed." *Ibid.* Here, the relevant act is the Court of Claims Act, not PA 436. The Court of Appeals correctly recognized this, and reached the common-sense

consolidation. The Court of Appeals heard oral argument in *Boler* on April 4, 2018. It is anticipated that whichever party suffers an adverse ruling will apply to this Court for leave to appeal. The EMs believe it would be appropriate to consolidate these two cases at that time.

conclusion that any evaluation of the jurisdictional provisions of the Court of Claims Act must begin by examining that act itself:

While PA 436 and its characterization of emergency managers may be relevant in another context, the question presented here is one of jurisdiction, and it is the intent behind the Legislature's grant of jurisdiction to the Court of Claims, through MCL 600.6419 in particular, that must direct this Court's analysis. See *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 521; 821 NW2d 117 (2012) ("[T]he first step of statutory interpretation is to review the language of the statute at issue, not that of another statute.") Thus, in determining whether claims against an emergency manager fall within the jurisdiction of the Court of Claims, we begin by examining the plain language of MCL §600.6419(7).

(Op. at 19).

The Court of Claims Act grants exclusive jurisdiction over contract and tort claims against the "State or any of its departments or officers." MCL §600.6419(1). The Act then defines which entities and persons fall within that term. MCL §600.6419(7).² The Court of Appeals correctly held that EM's are "State officers" within that definition for two reasons.

First, the Court of Appeals agreed with the Court of Claims that EMs are State "administrative officers" in light of the myriad provisions in PA 436 demonstrating that they act on behalf of the State. (Op. at 19–20.)

Second, the Court of Appeals observed that EMs are employees of the State (being appointed, paid, and supervised by the State), and were, at the time of the EM conduct complained of by Plaintiffs, allegedly "acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties." (Op. at 19). This status fits

² "As used in this section, 'the state or any of its departments or officers' means this state or . . . an officer, employee, or volunteer of this state . . . acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties."

the definition of those parties who are subject to exclusive jurisdiction of the Court of Claims. MCL §600.6419(7). The court properly concluded that “[w]here a statute supplies its own glossary, courts may not import any other interpretation but must apply the meaning of the terms as expressly defined.” (Op. at 19 (citations omitted)). The State Defendants’ argument that the PA 436 must be consulted to determine whether a person is subject to Court of Claims jurisdiction is, as the Court of Appeals said, a “red herring.”

State Defendants also argue that EMs are not State officers within the meaning of the Court of Claims Act because PA 436 only gives them the right to sue in the Court of Claims, not to be sued. But this overlooks the structure of the Court of Claims Act. The Act gives exclusive jurisdiction over lawsuits against the State and its departments and officers, and authorizes them to countersue the plaintiff. MCL §600.6419(1). The Act does not contemplate that the State or one of its departments or officers will *initiate* litigation in the Court of Claims. The fact that the Legislature has given EMs special authorization to *initiate* claims in that court does not alter the normal (and exclusive) jurisdiction of the Court of Claims when EMs are *defending* against claims brought against them in the official capacity.

Finally, the State Defendants cite *Michigan Association of Home Builders v Director of the Department of Labor & Economic Growth*, 481 Mich 496, 500–501, 750 NW2d 593 (2008), to urge application of the doctrine of “*expressio unius est exclusio alterius*” (the inclusion of one thing is the exclusion of another). But *Home Builders* did not involve a statute setting forth specific jurisdictional parameters like in the Court of Claims Act. Nor was that Court required to compare and contrast a separate statute (like PA 436), to evaluate whether it should influence the Court interpretation of the Administrative Procedures Act, MCL §24.305, (“APA”). Unlike the court below, the court in *Home Builders* was not required to evaluate a separate statute that included a clause that determined the issue presented to the court. If, for example, in *Home Builders* a

provision of a separate statute (such as the Revised Judicature Act) had specified the manner in which circuit courts, exercising their appellate jurisdiction, must address decisions to remand administrative cases, the outcome would have been very different. The Court would have looked first to the RJA, and not only the APA, just as the court below looked first to the Court of Claims Act in this case, and not PA 436.

C. **A LOGICAL ANALYSIS OF THE TOTALITY OF PA 436 SUPPORTS THE CONCLUSION THAT EMERGENCY MANAGERS ARE STATE OFFICERS**

Next, the State Defendants isolate certain provisions of PA 436 to argue that the Legislature “intended” to exclude EMs from the definition of “State officer” in the Court of Claims Act.

First, they contend that under MCL §141.1549(2), an EM’s role is “local in character” because the EM is authorized “to act for and in the place and stead of the governing body and the office of chief administrative officer of the local government.” In plucking one line from one section of PA 436, the State Defendants overlook other, more specific indications within PA 436 that show EM’s appointed under PA 436 act are State officers:

As the Court of Claims observed,

[a]n emergency manager is a creature of the Legislature with only the power and authority granted by statute. An emergency manager is appointed by the governor following a determination by the governor that a local government is in a state of financial emergency. The emergency manager serves at the governor’s pleasure. The emergency manager can be removed by the governor or by the Legislature through the impeachment process. The state provides the financial compensation for the emergency manager. All powers of the emergency manager are conferred by the Legislature. Those powers include powers not traditionally within the scope of those granted municipal corporations. The Legislature conditioned the exercise of some of those powers upon the approval of the governor or his or her designee or the state treasurer. The Legislature has also subjected the emergency manager to various codes of conduct otherwise applicable only to public servants, public officers and state officers. *Through the various provisions within the act, the state charges the emergency manager with the general task of restoring fiscal stability to a local government placed in*

receivership—a task which protects and benefits both the state and the local municipality and its inhabitants.

(Op. at 19–20 (citations omitted) (emphasis supplied).) This analysis is consistent with the Legislature’s stated purpose for enacting PA 436:

(a) That the health, safety, and welfare of the citizens of this state would be materially and adversely affected by the insolvency of local governments and that the fiscal accountability of local governments is vitally necessary to the interests of the citizens of this state to assure the provision of necessary governmental services essential to public health, safety, and welfare.

(b) That it is vitally necessary to protect the credit of this state and its political subdivisions and that it is necessary for the public good and it is a valid public purpose for this state to take action and to assist a local government in a financial emergency so as to remedy the financial emergency by requiring prudent fiscal management and efficient provision of services, permitting the restructuring of contractual obligations, and prescribing the powers and duties of state and local government officials and emergency managers...

MCL §141.1543. Under those legislative findings, Emergency Managers are State officers who exercise their State authority to benefit all Michiganders. They are therefore subject to the jurisdiction of the Court of Claims, as the Court of Appeals correctly concluded.

Second, State Defendants contend that MCL §141.1560(2)(b) and (c) support their attempt to distinguish between State officers and Emergency Managers, because those sections require the Attorney General to defend “State officials and officers” under subsection (b) and “Emergency Managers” under subsection (c). The State Defendants argue that this distinction would be unnecessary if Emergency Managers were State officers. The Court of Appeals correctly observed that this does not tell us whether Emergency Managers are also State officers. (Op. at 19–20.)

This particularly true since the two subsections are different in scope. Subsection (b) imposes on the Attorney General a duty to defend State officers engaged in activity under PA 436. Subsection (c) imposes a duty to defend Emergency Managers only if they were acting within the scope of their authority under PA 436. Thus, an equally sound interpretation of these subsections

is that Emergency Managers are State officers, but unlike other State officers, the Attorney General's duty to defend is narrower for Emergency Managers than for other State officers. But, again, it is unnecessary to get bogged down with the minutiae of two subsections in PA 436 that have nothing to do with the jurisdictional reach of the Court of Claims Act. As the Court of Appeals correctly held, the proper focus of the jurisdictional analysis is on the jurisdictional provisions in Court of Claims Act.

Third, the State Defendants' compare and contrast MCL §141.1560 and §141.1572. Under MCL §141.1560(4) and (5), the municipality under emergency management bears the responsibility to insure against liabilities, defend emergency managers and pay damages arising from suits against an emergency manager. In contrast, MCL §141.1572 provides that no "cause of action . . . may be maintained" against "this State or any department, agency, or entity of this State, or any officer or employee of this State acting in his or her official capacity, or any membership of a receivership transition advisory board acting in his or her official capacity" for "any activity authorized by this Act." (PA 436 makes this distinction between challenges to acts "authorized" by statute and other "actions taken" in other places as well. *See, e.g.*, MCL §141.1560(b)–(c).) The State Defendants argue that Emergency Managers can't be State officers when PA 436 precludes claims against the State but contemplates them being filed against Emergency Managers. But this misses the mark. These three provisions can be read together to include EMs within the term "officer or employee of this state" because no suit should be maintained by an EM for his activity *authorized* by PA 436.

Indeed, MCL §141.1560(4) does not *authorize* claims against EMs that would be otherwise prohibited if filed against "State officers" under MCL §141.1572. Rather, it permits them to protect themselves by acquiring insurance to cover liability arising from actions that "resulted from conduct of the emergency manager or any employee, agent, appointee, or contractor of the

emergency manager taken in accordance with [PA 436] during the emergency manager’s term of service.” Likewise, MCL §141.1560(5) addresses allocation of responsibility for costs after an Emergency Manager’s service ends, if there is a “claim, demand, or lawsuit arising *from an action taken* during the service of that emergency manager, and not covered by a procured worker’s compensation, general liability, professional liability, or motor vehicle insurance” MCL §141.1560(5) (emphasis supplied).

In other words, Sections 141.1560(4) and (5) do not address whether a claim may be filed against an EM for his authorized actions, but rather what insurance may be acquired and how to address uninsured expenses arising from lawsuits alleging harm from “actions taken.” Such a lawsuit might assert an EMs actions were authorized, unauthorized, or fail to address the issue, but still assert a claim that arose “from an action taken,” as distinguished from a challenge to statutory authority.

In short, anyone with \$175 can file a lawsuit. And *in forma pauperis* plaintiffs don’t even need that. The Legislature simply decided in advance how to allocate litigation-related costs when lawsuits are inevitably filed, regardless of whether the claim has merit or is barred by the immunity provisions in PA 436 or the Government Tort Liability Act.³

Finally, State Defendants argue MCL §141.1549(9)(c) establishes an EM is not a State officer because it obligates EMs to act in accordance with “1968 PA 318, MCL §15.301 *et seq.*, *as if* he or she were a state officer.” (emphasis supplied.) PA 318 addresses conflicts of interest by legislators and State officers, defined by reference to specific officeholders identified at MCL §15.303:

³ The State Defendants’ argument that it is anomalous to have a municipality pay to insure a “State officer” rings hollow when noting that the State pays Emergency Managers as its own employee, which is a far stronger affiliation suggesting State officer status.

As used in this act:

(a) The term “state officer” means only a person occupying one of the following offices established by the constitution: governor; lieutenant governor; secretary of state; state treasurer; attorney general; auditor general; superintendent of public instruction; member of the state board of education; regent of the university of Michigan; trustee of Michigan State University; governor of Wayne State University; member of a board of control of one of the other institutions of higher education named in section 4 of article 8 of the constitution or established by law as therein provided; president of each of the foregoing universities and institutions of higher learning; member of the state board for public community and junior colleges; member of the supreme court; member of the court of appeals; member of the state highway commission; director of the state highway commission; member of the liquor control commission; member of the board of state canvassers; member of the commission on legislative apportionment; member of the civil service commission; state personnel director; or member of the civil rights commission; together with his principal deputy who by law under specified circumstances, may exercise independently some or all of the sovereign powers of his principal whenever the deputy is actually exercising such powers.

The office of “emergency manager,” being a newly created office under PA 436, is not listed in MCL §15.303. Therefore, it would have been unclear, confusing, and insufficient to state in PA 436 at MCL §151.1549 that an emergency manager “is” a State officer under PA 318 at MCL §15.303, because emergency managers are not listed in that statute. The only way the Legislature could write that subsection of PA 436, to assure emergency managers are subject to the conflict of interest laws, to be grammatically correct, and without also amending MCL §15.303, is to state (as it did) that they are subject to that law “as if” the definition in MCL §15.303 included “emergency managers.”

IV. CONCLUSION AND RELIEF REQUESTED

For these reasons, the Court of Appeals correctly held that Emergency Managers, appointed under PA 436, are State officers. On this issue—Argument III in the State Defendants’ Application—the Court should deny leave to appeal. However, as noted earlier, the former EMs

support leave to appeal on the issues raised in Arguments I, II, and IV of the State Defendants' Application for the reasons argued in the State Application and in the former EMS' own Cross-Application on those same issues.

Respectfully submitted,

Dated: April 5, 2018

/s/ William Y. Kim

William Y. Kim (P76411)

*For Defendant-Appellants, Former Emergency
Managers Darnell Earley and Gerald Ambrose*

CITY OF FLINT LEGAL DEPT.

1101 S. Saginaw Street, 3rd Floor

Flint, MI 48502

810.766.7146

wkim@cityofflint.com

IN THE SUPREME COURT
FOR THE STATE OF MICHIGAN

MELISSA MAYS,
MICHAEL ADAM MAYS, JACQUELINE
PEMBERTON,
KEITH JOHN PEMBERTON,
ELNORA CARTHAN, and
RHONDA KELSO,

Plaintiffs-Appellees,

v.

GOVERNOR RICK SNYDER,
STATE OF MICHIGAN,
MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY, and
MICHIGAN DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants-Appellants,

-and-

DARNELL EARLEY and
JERRY AMBROSE,

Defendants, Cross-Appellants,
and Cross-Appellees,

Supreme Court No. 157335

Related Case No. 157340

Court of Appeals No. 335555

Consolidated Cases: 335725, 335726

HON. KATHLEEN JANSEN, P.J.

HON. KAREN M. FORT HOOD

HON. MICHAEL J. RIORDAN

Court of Claims No. 16-000017-MM

HON. MARK T. BOONSTRA

PROOF OF SERVICE

The undersigned certifies that on April 5, 2018, I directed that a copy of the City of Flint's Application for Leave to Appeal to be served upon the attorneys of record in the above cause by filing them with the TrueFiling system, which will serve copies on all attorneys of record who have appeared below.

Respectfully submitted,

Dated: April 5, 2018

/s/ William Y. Kim

William Y. Kim (P76411)

*For Defendant-Appellants, Former Emergency
Managers Darnell Earley and Gerald Ambrose*

CITY OF FLINT LEGAL DEPT.
1101 S. Saginaw Street, 3rd Floor
Flint, MI 48502
810.766.7146
wkim@cityofflint.com